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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SARGON ENTERPRISES, INC., Plaintiff and Appellant, v. UNIVERSITY OF SOUTHERN CALIFORNIA et al., Defendants and Respondents.	B167519 c/w B169619 x-ref. B156587 (Super. Ct. No. BC 209992)
SARGON ENTERPRISES, INC., Plaintiff and Appellant, v. UNIVERSITY OF SOUTHERN CALIFORNIA et al., Defendants and Respondents.	B163707 x-ref. B156857 (Super. Ct. No. BC 263071)

APPEALS from orders and a judgment of the Superior Court of Los Angeles County. Marvin M. Lager, Judge. Reversed.

Greines, Martin, Stein & Richland, Timothy T. Coates and Jens B. Koepke for Plaintiff and Appellant in B167519, B169619.

Jay S. Bloom for Plaintiff and Appellant in B163707.

Reed Smith, James C. Martin, Michael K. Brown, Barry J. Thompson and Dennis Peter Maio for Defendants and Respondents University of Southern California and Winston W. L. Chee in B167519 and B169619.

Reed Smith, George P. Schiavelli, Philip M. Drewry, Lisa M. Baird and Andrea M. Schoor for Defendants and Respondents University of Southern California, Winston W. L. Chee and Hessam Nowzari in B163707.

In these consolidated appeals, we reverse the in limine ruling excluding evidence of lost profit damages in the contract action and remand for a new trial on lost profit damages. As for plaintiff's untried fraud claims, we reverse the judgment of dismissal in the fraud action and reverse the order denying leave to amend in the contract action. We also reverse with directions the postjudgment orders awarding defendants their costs and attorney fees in the contract action.

BACKGROUND[1]

Following a jury trial, plaintiff Sargon Enterprises won a breach of contract judgment against defendant University of Southern California (USC). The main issue at trial was whether USC had properly conducted a dental implant clinical trial study for which USC faculty member Dr. Winston Chee, B.D.S., was principal investigator. The jury found that USC had breached the Clinical Trial Agreement (Agreement) by failing to

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1 This is the second appeal in this action. In the prior appeal, we affirmed the summary judgment granted to three defendants, Dr. Donovan, Dr. Handelsman, and Dr. Becker. (*Sargon Enterprises, Inc. v. Donovan* (Apr. 7, 2003, No. B156587).)

perform the clinical trial study according to the terms of the Agreement.[2] The jury awarded plaintiff over $433,000 in compensatory contract damages. The jury also found for plaintiff on USC's cross-complaint for breach of the Agreement. USC does not challenge the verdicts for plaintiff.

Plaintiff's appeal challenges the order granting the motion in limine to exclude evidence of lost profit damages as a component of breach of contract damages at trial. The court excluded the lost profit damages evidence based on its determination that lost profits were not reasonably foreseeable to USC during negotiations of the Agreement. Plaintiff contends, however, the evidence showed it was reasonably foreseeable during negotiations that plaintiff would suffer lost profits if USC breached the Agreement by, among other things, failing to provide plaintiff with a timely and accurate 1-year interim report of the study.

Plaintiff's appeal also challenges two orders which precluded it from pursuing newly discovered fraud claims against USC, Dr. Chee, and USC's Director of Advanced Periodontics, Dr. Hessam Nowzari, D.D.S, Ph.D., M.Ed. In the contract action, plaintiff was denied leave to amend the complaint to add fraud claims based on newly discovered evidence of allegedly fraudulent conduct designed to destroy the clinical trial study, impair the reputation of plaintiff's dental implant, and undermine plaintiff's foreign distribution agreements. According to plaintiff's fraud allegations, defendants intentionally destroyed and altered patient records in the clinical trial study, allowed the approval of the clinical trial study by the USC Institutional Review Board to lapse, assigned unqualified

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2 Plaintiff presented evidence that the clinical trial study's 1-year interim report was defective for reasons including: (1) the report was late; and (2) it failed to provide information required by the Agreement (such as the date on which the implant was placed, the date when the patient was last checked, how long the implant was in place, the quality of the tissue, the amount of bone growth). Plaintiff presented evidence that the study failed to comply with protocol set forth in the Agreement, such as: (1) one patient was over the age limit; (2) one patient's implant was placed too close to the sinus; and (3) the wrong cement (non-water soluble) was used to place the implants, resulting in gum boils and requiring surgery to remove the cement. Plaintiff also presented evidence that, in violation of the Agreement, it was not allowed to see the study's patient records.

investigators to work on the study, and failed to disclose during discovery $300,000 in donations from plaintiff's competitor, Noble Biocare.

During discovery, plaintiff discovered that Noble Biocare had donated $300,000 to USC, which plaintiff calls "virtual bribery." Before the clinical trial study began, Noble Biocare and USC had an exclusive use agreement whereby Nobel Biocare's implant was the only implant being used by the USC School of Dentistry. After the clinical trial study began, however, USC canceled the exclusive use contract and began purchasing plaintiff's implant for use outside the clinical study. USC also began training dentists to use plaintiff's implant, which can be immediately fitted or loaded with a restoration or crown without the usual three to six-month waiting period required for the implant to adhere to the jawbone. USC and plaintiff had discussed a $10 to $15 million donation from plaintiff to build a new dental implant training center.

Plaintiff contends that during discovery, USC attempted to hide the full extent of Noble Biocare's donations by disclosing only one $50,000 donation. Plaintiff claims it did not discover the other donations until it deposed Noble Biocare's representatives in July 2001, and received a summary of payments from Noble Biocare in September 2001.

Plaintiff sought leave to add the fraud claims to the breach of contract complaint on November 16, 2001, which was 16 months before the jury trial began on the breach of contract claims on March 7, 2003. Plaintiff requested leave to add causes of action for conversion (for intentionally destroying, altering, and damaging patient records); fraudulent deceit (for destroying patient records, allowing the Institutional Review Board approval to lapse, accepting and failing to disclose the donations from Noble Biocare, and misrepresenting USC's expertise to perform the study); fraudulent misrepresentation (for misrepresenting the technical or scientific qualifications of the persons conducting the study); fraud (for altering patient records); breach of the implied covenant of good faith and fair dealing (for altering patient records); and intentional interference with prospective

economic advantage (for altering patient records to disrupt plaintiff's business agreements with its foreign distributors).[3]

On December 6, 2001, plaintiff filed a separate fraud complaint against USC, Dr. Chee, and Dr. Nowzari, based on the same allegations stated above. Plaintiff sought punitive damages for fraud.

In the contract action, defendants opposed the motion to amend, stating that "[t]he new fraud claims are entirely different from the breach of contract claims previously asserted, and would significantly change the tenor and complexity of the action." (Emphasis omitted.)

In support of its motion, plaintiff contended that it had sought leave to amend at the earliest opportunity following months of unsuccessful settlement negotiations during mediation, and ten days of in limine hearings on lost profit damages from July through October 2001. Plaintiff pointed out that defendants were aware of the document alteration allegations since February 2001, and had already designated a defense expert on that subject. Plaintiff's counsel stated that "[t]his seems to be a perfect time to bring these matters before the court, to get it altogether. We don't even have a trial date yet in the main action . . . ."

On January 23, 2002, the trial court denied the motion to amend as untimely and prejudicial. The trial court stated that although no jury trial date had been set, "the trial began a long time ago" with the ten days of in limine hearings. The trial court commented,

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3 In its respondents brief, defendants refer to the motion for leave to amend as an attempt to "resurrect . . . three other, subsequently dismissed, tort causes of action[.]" The key words are "subsequently dismissed," because plaintiff was not attempting to "resurrect" causes of action that were previously dismissed. The original breach of contract complaint contained tort causes of action for intentional interference with prospective economic advantage, trade disparagement, and unfair trade practices. The trial court granted summary judgment to defendants Donovan, Becker, and Handelsman on all causes of action, and granted summary adjudication to defendants USC and Chee on the three tort causes of action only. (During the jury trial, plaintiff voluntarily dismissed Dr. Chee from the contract action.) Plaintiff appealed from the summary judgment in favor of Donovan, Becker, and Handelsman, which we affirmed. (*Sargon Enterprises, Inc. v. Donovan* (Apr. 7, 2003, B156587).) When plaintiff filed the motion for leave to amend November 16, 2001, the appeal from the summary judgment was still pending.

"I've also sat in my office for the better part of the last two months, trying to figure out how the facts fit with the law and the contract. This is not a new beginning. This is, as far as I'm concerned, in the middle of trial." The trial court called the motion to amend "dilatory by any measure" due to plaintiff's awareness of the underlying facts "for at least many months, and most of the facts for a year or more." The trial court noted that if it were to allow the amendment, "[s]ubstantial law and motion practice will likely follow[,] as well as additional substantial discovery." Accordingly, the trial court found "[t]he delay in seeking leave to amend has been prejudicial to USC. The amendment appears to be simple legal gamesmanship."

On January 24, 2002, the day after leave to amend was denied, the trial court granted the in limine motion to exclude evidence of lost profit damages. On July 2, 2002, plaintiff petitioned for writ of mandate and request for immediate stay, which we denied. (*Sargon Enterprises, Inc. v. Superior Court* (July 11, 2002, No. B159736).)

On May 3, 2002, the trial court denied a second motion for leave to amend the contract complaint. Without elaboration, the trial court stated that plaintiff's second motion to amend was brought "in bad faith, and . . . there has been prejudicial delay."

Thereafter, plaintiff served the fraud complaint. Defendants responded with a demurrer and motion to strike the fraud complaint. Defendants also filed a notice of related action which resulted in the assignment of the fraud action to the same trial court handling the contract action.[4]

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[4] After the fraud action was transferred to Judge Lager's court, plaintiff filed a peremptory challenge under Code of Civil Procedure section 170.6. Judge Lager struck this challenge as untimely, finding the fraud action was merely a continuation of the contract action. Division Two denied plaintiff's petition for writ (*Sargon Enterprises, Inc. v. Superior Court* (May. 21, 2002, No. B158534)) and the Supreme Court denied review (*Sargon Enterprises, Inc. v. Superior Court* (No. S107137)).

The hearing on the demurrer and motion to strike was delayed to allow plaintiff to file an amended complaint in the fraud action. After the amended complaint was filed, the trial court sustained the demurrer without leave to amend and granted the motion to strike. The trial court reasoned that because the identical primary right was at issue in the contract and fraud actions, the two actions could not be maintained without impermissibly splitting a single cause of action. As for plaintiff's claims against Dr. Nowzari, the trial court held the claims should have been asserted by way of a compulsory cross-complaint in Nowzari's action against plaintiff. (*Nowzari v. Sargon Enterprises, Inc.* (Super. Ct. L.A. County, 2003, No. BC214817.) In issuing its ruling, the trial court described the fraud complaint as a "sham as it seeks to avoid denial of motions to amend in [the contract action], split causes of action and assert causes of action [against Nowzari] that must be alleged by way of compulsory cross-complaint."

In its appeal from the judgment of dismissal in the fraud action, plaintiff contends the contract and fraud actions involve violations of two different primary rights: (1) the breach of contract action involves the contractual breach of failing to perform the contract; whereas (2) the fraud action involves intentional fraudulent conduct designed to destroy the clinical study, discredit the reputation of plaintiff's implant, and harm plaintiff's foreign distributorship agreements. Plaintiff points out that in successfully blocking it from amending the contract complaint, defendants had argued "[t]he new fraud claims are entirely different from the breach of contract claims previously asserted, and would significantly change the tenor and complexity of the action." (Emphasis omitted.)

Plaintiff filed an earlier challenge for cause against Judge Lager in the contract action, based on the alleged membership of Judge Lager's wife on the governing and advisory boards of the Institute for Corporate Counsel, which "is operated through the USC Law School and is described on the USC website as a non-profit joint venture between the University of Southern California and the Los Angeles County Bar Association." Judge Lager struck the statement of disqualification. (Code Civ. Proc., § 170.4, subd. (b) [a judge may strike the statement of disqualification without sending it to another judge if the statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification].) We denied the petition for writ of mandate with Justice Mallano dissenting (*Sargon Enterprises, Inc. v. Superior Court* (Mar. 21, 2002, No. B157167)), and the Supreme Court denied review (*Sargon Enterprises, Inc. v. Superior Court* (Apr. 19, 2002, No. S105528)).

The remaining issues on appeal are: (1) whether the trial court properly awarded USC its attorney fees as the prevailing party in the contract action, notwithstanding the fact that plaintiff had prevailed on both its breach of contract claim and USC's cross-complaint at trial; and (2) whether the trial court properly taxed plaintiff's costs, thereby bringing plaintiff's total recovery "just $1,800 below USC's [Code of Civil Procedure] section 998 offer, and allowing the court to shift $51,000 of USC's costs onto" plaintiff.

DISCUSSION

I

LOST PROFITS

The trial court granted defendants' in limine motion to exclude all evidence of lost profit damages based on its legal determination that lost profits were not reasonably foreseeable when the contract was made. (See *Lewis Jorge Const. Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 456-458.) The trial court reached this conclusion after considering extensive testimony presented over ten days of in limine hearings. The parties agree that in this context, the in limine ruling is "subject to independent review as the functional equivalent of . . . a motion for nonsuit." (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 634-635, superseded by statute on another ground as set out in *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1079-1080.) "Understood as a motion for nonsuit, the question is whether, disregarding conflicting evidence, indulging in every legitimate inference that may be drawn from the evidence, and viewing the record in the light most favorable to plaintiffs, evidence of [lost profits] will support a judgment in plaintiffs' favor. [Citations.]" (*Id.* at p. 635.)

A. The Agreement Did Not Allocate Risk of Loss

Before we address the issue of foreseeability, we will discuss the trial court's alternative legal determination that the Agreement contained a disclaimer which expressly absolved defendants of liability for lost profit damages. The trial court stated that "[l]ost profit damage is not recoverable herein. [¶] [It] is disclaimed by the Agreement itself. The contracting parties allocated the risk."

The purported disclaimer language identified by the trial court is found in paragraph 11.2.d of the Agreement: ". . . (i) nothing contained herein shall be construed as a representation or warranty on the part of the University that any particular results, inventions or discoveries will be achieved by the Study, or that the Sargon Implant Technology and/or any results, discoveries or inventions achieved by the Study, if any, are or will be commercially exploitable and further makes no representation or warranty whatsoever as to the commercial or scientific value of the Sargon Implant Technology or any results which may be achieved by the Study, and (ii) UNIVERSITY MAKES NO WARRANTIES, EXPRESS OR IMPLIED, AS TO THE MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE SARGON IMPLANT TECHNOLOGY, THE STUDY OR ANY INVENTION, PRODUCT OR PROCESS CONCEIVED, DISCOVERED OR DEVELOPED UNDER THIS AGREEMENT. Neither Sponsor, the Principal Investigator, nor any other person is authorized to give any such warranty in the name or on behalf of the University."

We disagree with the trial court's legal conclusion that the above-quoted language constitutes a disclaimer of lost profit damages. The purpose of the clinical trial study, as stated in Appendix B of the Agreement, was to "evaluate the efficacy of the Sargon Immediate Load implant as an immediate placed and loaded implant." If USC had promised a particular outcome in advance of the study's completion, its credibility and objectivity would have been destroyed. Apparently to dispel any appearance of bias, Paragraph 11.2.d disclaimed any warranty for a particular outcome. The warranty disclaimer was not a disclaimer absolving USC from liability for failing to perform the study according to the terms of the Agreement.

Nothing in paragraph 11.2.d or elsewhere in the Agreement allocated the risk of lost profit damages or absolved USC from liability for failing to perform its obligations under the Agreement. As plaintiff explains, "The provision, paragraph 11.2(d), provides that USC does not warrant the results of the study or the commercial exploitability of the implant. This simply means that USC (1) does not guarantee that the study, if properly done, will prove the implant is efficacious, or (2) that even if it is efficacious, there will be

a market for it. But not guaranteeing certain things is not the same as being fully absolved from liability for *failing* to perform its obligation under the Agreement. Nor does it indicate that USC was unaware of the stakes of failing to adhere to its obligations – namely, disruption of the marketing of the Sargon Implant and consequent loss of profits."

Defendants contend the noncommercial nature of the Agreement supports the inference that lost profit damages are not recoverable for breach of contract. Defendants state that it "could hardly have been clearer [that the A]greement was noncommercial. It recited that USC and Sargon agreed that the study 'will further the *instructional, scholarship and study objectives* of the University in a manner consistent with its status *as a nonprofit tax-exempt, educational institution,* and . . . may derive benefits for both [Sargon] and the University *through the discovery of new knowledge.'* . . . The agreement was all about instruction, scholarship, education, and the discovery of new knowledge – *and not at all about profits.* Tellingly – as Sargon grudgingly acknowledges – the agreement does not even refer to profits. Indeed, it contains only a single word that is cognate to 'profits' – the adjective 'nonprofit,' used to describe USC as an institution."

We believe defendants are attempting to read too much into the Agreement. Defendants have cited no authority for the proposition that USC's nonprofit tax-exempt status renders it immune from liability for lost profit damages, and have cited no evidence to show that the parties negotiated for such immunity. On the contrary, Dr. Lazarof, who signed the Agreement on plaintiff's behalf, testified that he did not negotiate for any specific provision concerning damages for breach of contract, including lost profits. We decline to read a provision into the Agreement that was neither stated nor intended by the parties. (See *Addiego v. Hill* (1965) 238 Cal.App.2d 842, 846-847 ["The law refuses to read into contracts anything by way of implication except upon grounds of obvious necessity. '[I]mplied covenants are not favored in the law; and courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties to the contract made' [citation]."].)

B. Foreseeability of Lost Profit Damages

"An injured party may recover for a breach of contract the amount which will compensate it 'for all the detriment proximately caused [by the breach], or which, in the ordinary course of things, would be likely to result [from the breach].' (Civ. Code, § 3300.) The damages awarded should, insofar as possible, place the injured party in the same position it would have been had the contract properly been performed, but it may not be awarded more than the benefit which it would have received had the promisor performed. (Civ. Code, § 3358; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 648-649 [160 P.2d 804]; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 123 [135 Cal.Rptr. 802].) Damages may be awarded for breach of contract for those losses which naturally arise from the breach, or which might reasonably have been foreseen by the parties at the time they contracted, as the probable result of the breach. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, *supra.*, 66 Cal.App.3d at p. 125.) Damages must be reasonable, however, and the promisor is not required to compensate the injured party for injuries that it had no reason to foresee as the probable result of its breach when it made the contract. (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 603 [262 P.2d 305]; *Ely v. Bottini* (1960) 179 Cal.App.2d 287, 294 [3 Cal.Rptr. 756].)

"Where the injured party shows that, as a reasonable probability, profits would have been earned on the contract except for its breach, the loss of the anticipated profits is compensable. (*Nelson v. Reisner* (1958) 51 Cal.2d 161, 171-172 [331 P.2d 17]; *Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 747 [118 Cal.Rptr. 811].) Where business activity has been interrupted by a breach of contract, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable where such damages are shown to have been foreseeable and reasonably certain. (See *Grupe v. Glick* (1945) 26 Cal.2d 680, 692 [160 P.2d 832]; *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143 . . . .) '[W]here the operation of an established business is prevented or interrupted, as by a . . . breach of contract . . . damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the

reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.' (*Grupe v. Glick*, *supra*, 26 Cal.2d 680, 692.)" (*Burnett & Doty Development Co. v. Phillips* (1978) 84 Cal.App.3d 384, 389-390.)

In this case, "the question is whether, disregarding conflicting evidence, indulging in every legitimate inference that may be drawn from the evidence, and viewing the record in the light most favorable to plaintiffs, evidence of [lost profits] will support a judgment in plaintiffs' favor." (*Aas v. Superior Court, supra,* 24 Cal.4th at p. 635.)

In the trial below, the jury found that defendants had breached the Agreement by, among other things, failing to provide a timely and accurate 1-year interim report. Plaintiff contends the terms of the Agreement support its position that the parties had agreed to allow plaintiff to use the 1-year interim report to market its implant abroad. Plaintiff points to Appendix F of the Agreement, which states that patients were to be informed "that the results may be used in connection with the application for registration of the implant procedure internationally." Plaintiff also cites paragraph 10 of Appendix B, which states: "On completion of the study, the investigators responsible will prepare a clinical report. Before the publication of the interim report, at a 1 year level of follow-up, no data or results with the aims of the present study may be published or presented by anyone."

Plaintiff presented testimony indicating that defendants knew when the Agreement was made that the 1-year interim report was crucial for plaintiff's marketing purposes.[5] At

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5 In its statement of facts in its respondent's brief, USC states that the Agreement "prohibited both Sargon and USC from using the study for *any* commercial purpose [citing to paragraph 6 ("Publicity") of the Agreement], [and] allow[ed] Sargon only to state that the Sargon Implant was the subject of the study [citing to Schedule 1 of the Agreement]." The above statement is somewhat misleading, however, because neither Paragraph 6 nor Schedule 1 imposed a blanket prohibition against the commercial use of the study, and Schedule 1 permitted plaintiff to make a limited statement about the study in its packaging, informational, advertising, and promotional materials without USC's written consent. Paragraph 6 and Schedule 1 simply required that USC's written consent be obtained before making any *other* commercial use of USC's name, trade name, trademark or other designation, beyond what is permitted by Schedule 1. The fact that USC's written consent was required for other uses of USC's name, trade name, trademark, etc., does not mean the Agreement prohibited plaintiff, under *any* circumstances, "from using the study for *any* commercial purpose [and allowed] Sargon only to state that the Sargon Implant was the subject of the

the in limine hearing, Dr. Robert Garfield, a consultant for plaintiff, confirmed that USC had agreed during negotiations that plaintiff could use the 1-year interim report to market its implant internationally. Dr. Garfield testified that beginning in 1995, Dr. Abou-Rass and Dr. Landesman, Dean of the USC School of Dentistry, approached plaintiff about using the implant at USC to train dental students and promote the implant. According to Dr. Garfield, it was Dr. Landesman who first suggested that a clinical trial be conducted at USC to ascertain the validity of the implant.[6] Dr. Garfield testified that although the implant was successfully being used in this country and there was "evidence" (consisting of "radiographs of Abou-Rass's cases, or Sargon's cases, and other cases of other dentists in the community that had been working with the [Sargon Implant] System") that "the implant worked as stated, as claimed, . . . you still need to have a clinical trial study. You cannot go out, and market. You cannot go out and teach other dentists how to use a clinical device, unless you got a study to support its usefulness, that it works." According to Dr. Garfield, Dr. Landesman (who signed the Agreement as Dean of the USC School of Dentistry) had stated that plaintiff "would be able to use the [1-year] reports for marketing purposes, for giving [plaintiff's] distributors reports that they needed to be able to market the implant." "He [Dr. Landesman] was very enthusiastic and excited about [the financial reward that plaintiff might gain by using the 1-year report for marketing purposes]. He felt

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study . . . ."

Schedule 1 allows plaintiff, during the course of the study, to include the following in its dental-implant product packaging and informational materials, advertising, promotional materials, and professional publications, without obtaining USC's prior written consent: "A statement that the Sargon Implant Technology is the subject of an ongoing five-year sponsored research program conducted by the University of Southern California School of Dentistry, subject to the following conditions and limitations: [¶] (a) Minor variations in wording and/or phraseology (e.g., references to 'USC' instead of to the 'University of Southern California') shall be permitted. [¶] (b) Under no circumstances shall the Sponsor utilize in any such materials any logo, trademark, pictorial or other rendering of any University structure or mascot, or any other proprietary intellectual property of the University (including, without limitation, stylized block-letter or script renderings of the letters 'USC', and colors or color combinations). [¶] (c) Under no circumstances shall the Sponsor include in any such materials any words or phrases in any way stating or implying that the Study has been completed, that the results of the Study are favorable or positive, or that the University in any way recommends, endorses, is promoting or has any financial interest in the Sargon Implant Technology and/or any related process or procedure."

6 In using the phrase "to ascertain the validity of the implant," we are aware that the implant was already approved for use in this country and that no further testing was necessary for that purpose.

that [the report] would have a huge effect on the commercial marketability of the implant, providing those reports were favorable." "He said . . . this would reestablish U.S.C. as one of the leading, if not the leading dental school in the world position that it had back in the 40's and the 50's. And having this implant used, and patients treated, and promoted by U.S.C. would make U.S.C. the second Gothenberg, which is the university in Sweden where the Branemark Implant [manufactured by Noble Biocare] was first studied and introduced which became a world center for implant training."

Dr. Sargon Lazarof similarly testified that Dr. Landesman had promised plaintiff the use of the 1-year interim report in marketing the implant internationally. According to Dr. Lazarof, "it was understood that the one year report is the starting point. That's what we were discussing the entire time. And the one year report, as said, it was constantly talked about with Dr. Landesman. This is what he was alluding to, that give us one year, and we'll give you the world. And that specifically described that report I could use it to market my implant internationally, and show the association of the Sargon Implant with U.S.C."

Dr. Lazarof testified that before signing the Agreement, he told Dr. Landesman that he "had talked to Dr. Hobo [a Japanese dentist who was teaching the Sargon Implant System in Japan and who was made a USC professor for that purpose] about $5 million in sales, and that those sales would be somehow related to the interim reports that [plaintiff was] going to be receiving from U.S.C. . . . ." Dr. Lazarof told Dr. Landesman "prior to the execution of the Agreement . . . that [plaintiff was] going to use the interim reports to obtain sales in Japan in excess of $5 million . . . ."

Plaintiff's evidence showed that Dr. Landesman had given USC professorships to foreign dentists who were teaching the Sargon Implant System abroad, had issued USC training certificates for the Sargon Implant System, and had helped plan a symposium in Monte Carlo to promote the implant. Dr. Landesman and Dr. Lazarof, before signing the Agreement, had even discussed plans for plaintiff to donate $10 to $15 million to USC to build a new dental implant training center. Dr. Lazarof testified that the amount of plaintiff's proposed future donation "was entirely based on the income projections that I

was showing, and this was, would be a very great, profitable thing for both the university and me, because the university was in business of selling education, and training, and doing research. And I wanted the doctors from the entire world to come to U.S.C., just like before they were doing, going to Gothenberg, to come to U.S.C. to get training in Sargon Implant System, and obviously, subsequently, they would be using the Sargon Implant." Dr. Lazarof testified that he was "already looking for real estate. We were asking the campus to see if we could get parking lot C. And build a building there. And I was specifically told that if we're not able to do that, why don't you look for something around the campus."

This evidence, viewed in the light most favorable to plaintiff, supports a finding that lost profit damages were reasonably foreseeable to USC when the Agreement was made. While plaintiff's ultimate success in recovering lost profit damages remains to be seen, there was sufficient evidence to preclude a finding that lost profit damages were not foreseeable as a matter of law.

The fact that, under the Agreement, plaintiff and USC were "independent contractors" and not "co-partners or joint venturers for any purpose whatsoever," does not require us to reach a different conclusion. The reasonable foreseeability of lost profit damages when the contract was made is not necessarily eliminated by the lack of a joint venture or partnership between plaintiff and USC.

C. The Proportionality Rule

Our determination that the evidence of lost profit damages should not have been excluded as unforeseeable as a matter of law is not affected by the rule that damages for breach of contract must not be excessive or unreasonable. (See *Avery v. Fredericksen & Westbrook* (1944) 67 Cal.App.2d 334 [court properly refused to award contract damages as measured by the cost to level and replace soil in excess of the property's fair market value].) In this case, the trial court found that the amount of lost profit damages claimed by plaintiff (which the trial court said was "in the area of $100 million," based on Dr. Lazarof's testimony that lost profit damages were "more than" $100 million), was in

extreme disproportion with the consideration received by USC to conduct the study (about $200,000).

As plaintiff correctly points out, however, "the focus of the evidentiary hearing was not the amount of profits lost, but rather their foreseeability, so Sargon did not nor was it required to put on any evidence of the *amount* of lost profits." Had the subject of the in limine hearing been the *amount* of lost profits, plaintiff would not have relied exclusively upon Dr. Lazarof's brief statement that lost profits were "more than" $100 million, but would have supplied much more evidence on that subject.

In addition, the trial court's assumption that USC received only $200,000 for conducting the study is incorrect. As plaintiff states, "USC stood to gain substantially more from the Agreement than just the $200,000 in contract payments. USC requested and received a $100,000 donation from Sargon, generated some $30,000 to $40,000 in fees from Sargon Implant trainings, had Sargon underwrite the Monte Carlo Symposium, and expected to use a $10-15 million donation from Sargon's profits to set up a new USC implant institute. And this doesn't count the even more valuable, but intangible benefits USC hoped to reap by capitalizing on the Sargon Implant to rebuild its prestige as a leading dental education institution."

We agree with plaintiff that because the focus of the in limine hearing was the foreseeability of lost profit damages, rather than the amount of lost profit damages, the record does not preclude an award of lost profit damages, as a matter of law, on the basis of extreme disproportion.

D. The New Business Rule

Defendants state that, "as the trial court found, Sargon 'began doing business in 1995,' a year prior to execution of the Clinical Trial Agreement, with profits of $28,932.80. In 1996, the year of the agreement's execution, Sargon was 'a new business in at least Japan and Korea, and a relatively new business in Saudi Arabia,' and its profits dropped to $5,108.67. In light of such facts, which Sargon had disclosed to USC, USC could not even have guessed whether Sargon would make any profit in the future and, if so, in what amount – especially because, one year after it began doing business, its profits

had plummeted more than 82 percent from $28,932.80 to $5,108.67. And, of course, USC could not have made any guess at all whether Sargon would lose any profits whatsoever if it breached the agreement by failing to deliver a timely and usable interim report in the first year of a modest five-year pilot study."

Given that the in limine hearings focused on forseeability and not the amount of lost profit damages, it is premature to determine whether such damages can be calculated with reasonable certainty. While plaintiff's business is relatively new, it does have "a track record of a few years showing sales in various markets." Plaintiff contends that "given Sargon's known sales history, expert testimony could easily establish what the world market for dental implants was and provide a conservative estimate of how much of that market Sargon could have captured." We believe the record is insufficient to exclude evidence of lost profit damages on the ground that the business is too new to calculate such damages with reasonable certainty.

E. Exclusion of Testimony

The trial court excluded evidence of a certain conversation, as related by Drs. Garfield and Lazarof, in which (according to plaintiff's opening brief) Drs. Landesman and Abou-Rass "acknowledged that if the study went well, Sargon would make 'huge' profits. During that conversation, Dr. Lazarof expressed concern about Dr. Chee's appointment [as the study's principal investigator] and said Dr. Abou-Rass was a better candidate. Dr. Lazarof warned that Dr. Chee's possible enmity towards him and/or his lack of objectivity about the Sargon Implant could ruin the study and imperil those profits, and asked whether USC would take responsibility in that case. Dean Landesman responded, 'Yes we are. You have nothing to worry about.'" (Citations omitted.)

Plaintiff contends the trial court erred in excluding the above-described testimony, either under the parol evidence rule, or as a direct contradiction of a clear and unequivocal admission, or as improper rebuttal evidence. We agree with this contention.

First, the parol evidence rule does not apply in the context before us. Plaintiff sought to introduce the conversation to show that lost profit damages from a breach of the Agreement were reasonably foreseeable. Plaintiff was not seeking to introduce the

conversation to vary the terms of an integrated agreement. As we stated earlier, the Agreement did not allocate risk of loss. Accordingly, the conversation should not have been excluded under the parol evidence rule.

Second, the trial court's determination that Drs. Garfield and Lazarof were fabricating the alleged conversation was not a proper basis for excluding the evidence. The trial court's reliance upon *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 654, and *Mikialian v. City of Los Angeles* (1978) 79 Cal.App.3d 150, 158, was misplaced. This is not a case of a witness contradicting his prior inconsistent deposition testimony. The purported conversation did not occur during contract negotiations, so neither witness contradicted prior testimony that lost profit damages was not a topic of contract negotiations. Plaintiff was not seeking to introduce the conversation to show that the Agreement contained a lost profit damages clause, but to show that lost profit damages from a breach of the Agreement were reasonably foreseeable.

Finally, as plaintiff points out, neither Dr. Garfield nor Dr. Lazarof testified about this conversation in rebuttal, but when they were recalled on direct examination. Accordingly, there was no improper rebuttal testimony.

II

THE FRAUD CLAIMS[7]

In opposing plaintiff's attempt to add the fraud claims to the breach of contract complaint, USC and Chee stated that "[t]he new fraud claims are entirely different from the breach of contract claims previously asserted, and would significantly change the tenor and complexity of the action." (Emphasis omitted.)

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[7] As for plaintiff's claims against Dr. Nowzari, the trial court held the claims must have been asserted by way of a compulsory cross-complaint in Nowzari's action against plaintiff. (*Nowzari v. Sargon Enterprises, Inc.* (Sup. Ct. L.A. County, 2003, No. BC214817.) Nowzari's action, however, involved different factual allegations regarding the alleged misappropriation of his name as the purported author of a book promoting plaintiff's implant. Accordingly, we disagree that the fraud claims must have been brought as a compulsory cross-complaint in Nowzari's action.

In its demurrer to plaintiff's fraud complaint, defendants stated that plaintiff "improperly seeks to 'split' its claims against defendants. All three actions involve the *same cause of action, the same operative facts, and same primary right* – performance of the Agreement."

Defendants may not have it both ways. Either the contract and fraud claims are "entirely different" claims, as defendants alleged in the contract action, or they are "the same cause of action," as defendants alleged in the fraud action.

In an analogous situation involving res judicata issues, it was stated: "'[W]here a party litigant successfully blocked the attempt of its opponents in an earlier case to amend their pleading and consolidate with another pending action to include certain issues, and later contended that such issues were res judicata because they might have been adjudicated in an earlier case, the Supreme Court in *United Bank & Trust Co. v. Hunt,* 1 Cal.2d 340, 345 . . . , held that "Litigants can not successfully assume such inconsistent positions" and treated the situation developed in the first trial as ". . . tantamount to an express determination on the part of the court with the consent of opposing counsel to reserve the issues involved for future adjudication."' [Citation.]" (*Sawyer v. First City Financial Corp.* (1981) 124 Cal.App.3d 390, 410-411 (conc. opn. of Wiener, J.) (*Sawyer*).)

We believe the same principle properly applies here. "Once having represented to the court there were two different actions with different issues, [defendants] may not now stop plaintiffs from having a full trial on those 'different issues.'" (*Sawyer, supra,* 124 Cal.App.3d at p. 412 (conc. opn. of Wiener, J.).)

While under the primary rights theory, the invasion of one primary right gives rise to a single cause of action even where there are different legal theories for relief (*Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, 162), here, the fraud allegations and the breach of contract allegations involve two separate primary rights. Unlike the *Ricard* case, where the same allegations were alleged in both actions under different legal theories of relief, in this case the allegations in plaintiff's fraud causes of action are not the same as those alleged in plaintiff's breach of contract cause of action.

We agree with plaintiff's analysis that "[t]he mere failure of performance of the clinical trial agreement does not violate the same primary right as actions deliberately and fraudulently undertaken to destroy the reputation of the implant by altering patient records, accepting bribes from plaintiff's competitor, and permitting the approval of the Institutional Review Board to lapse. [¶] Importantly, none of the alleged fraudulent acts need to be shown by plaintiff to prevail on the breach of contract action. In fact, defendant could comply with the specific provisions of a contract, and yet perform acts, ex contractu, intended to damage the other party's property or business interests. The liability is imposed by law, not contract, and violates a separate interest. As stated above, it was USC itself which asserted: 'The new fraud claims are entirely different from the breach of contract claims previously asserted.' . . . [¶] These acts were allegedly undertaken to cause damage to plaintiff's implant and its business as a whole, not just plaintiff's contractual rights. . . ."

A similar situation arose in *Sawyer, supra,* 124 Cal.App.3d 390, where the sellers of real property sued the buyers and others in two successive actions, first for breach of contract and later for fraud. With the exception of the bank defendants who had the benefit of a release, the appellate court reversed the judgment of dismissal for the remaining defendants in the second action. The court found that res judicata did not apply because the second action did not involve a violation of the same primary right as the first action, and, therefore, did not constitute an impermissible splitting of a single cause of action. "If a primary right is so split, determination of the issues in the first suit will be res judicata to the attempt to relitigate them in the second suit. Where the plaintiff has several causes of action, however, even though they may arise from the same factual setting, and even though they might have been joined in one suit under permissive joinder provisions, the plaintiff is privileged to bring separate actions based upon each separate cause." (*Saywer, supra,* 124 Cal.App.3d at pp. 398-399.)

The first action in *Sawyer* was to collect on a promissory note. The second action, which also related to the promissory note, rested "upon a completely different set of facts. . . . The core of the alleged wrongful conduct is an agreement among the parties to conduct

what is characterized as a sham foreclosure sale, the only substantive effect of which would be secretly to discharge the obligation to [plaintiff], leaving all other parties in essentially the same position as prior to the sale. Surely one's breach of contract by failing to pay a note violates a 'primary right' which is separate from the 'primary right' not to have the note stolen. That the two causes of action might have been joined in one lawsuit under our permissive joinder provisions . . . does not prevent the plaintiff from bringing them in separate suits if he elects to do so." (*Sawyer, supra,* 124 Cal.App.3d at pp. 402-403.)

Similarly, in this case, although the breach of contract and fraud claims both related to the clinical trial study, they involved different facts and two different primary rights. To paraphrase *Sawyer,* breaching a contract by failing to perform a clinical trial study pursuant to the terms of the Agreement violates a primary right which is separate from the primary right not to have the reputation of one's product destroyed by alleged intentional fraudulent acts. We therefore conclude it was error to sustain the demurrer without leave to amend on the ground that the fraud action was a sham and constituted an impermissible splitting of a single cause of action.

As for the second and sixth causes of action in the fraud complaint, plaintiff contends the demurrer "on the basis of technical pleadings defects" should not have been sustained without leave to amend. The trial court's order of dismissal mentioned no grounds for sustaining the demurrer other than the impermissible splitting of a cause of action (and, with regard to Nowzari, the failure to file a compulsory cross-complaint). We conclude, therefore, that the demurrer to the second and sixth causes of action was not sustained on the basis of technical pleadings defects.

As for the denial of leave to amend in the contract action, the issue is almost entirely academic. The trial court denied the motion for leave to amend the contract complaint as untimely and prejudicial. Plaintiff is nevertheless entitled to litigate the fraud claims in a separate action, which the trial court ultimately may choose to consolidate with the contract action on remand. Even without amending the contract complaint, plaintiff may accomplish the same result by obtaining consolidation of the two actions.

Under these unique circumstances, we conclude the denial of leave to amend the contract complaint was an abuse of discretion. Any alleged delay in filing the motion for leave to amend was not prejudicial given the 14-month hiatus between the denial of leave to amend and the commencement of the jury trial for breach of contract, and defendants' prior knowledge of the document alteration allegations for which they had already hired a defense expert.

We reject defendants' assertion that plaintiff's failure to challenge, in its opening brief, the ruling on the motion to strike constituted a waiver. Given that the trial court granted the motion to strike for the same erroneous reasons that it sustained the demurrer, plaintiff's failure to mention the motion to strike in the opening brief was a harmless oversight.

III

FEES & COSTS IN THE CONTRACT ACTION

Plaintiff recovered a jury verdict against USC in the contract action of over $433,000, but the trial court concluded that USC was the prevailing party under Civil Code section 1717. The trial court found that USC, by having avoided both lost profit damages of potentially "$40 million or $100 million or $300 million" dollars, and a jury verdict in excess of its $501,000 statutory settlement offer (Code Civ. Proc., § 998), was the prevailing party for having achieved more of its litigation objectives than did plaintiff. The trial court awarded USC attorney fees of $700,000, which exceeded plaintiff's jury verdict of over $433,000. Accordingly, the trial court's rulings transformed the winning party into the losing party.

Plaintiff seeks to overturn the trial court's finding that USC was the prevailing party under Civil Code section 1717. Ordinarily, that issue would be moot where, as here, the appeal results in a reversal and remand for further proceedings. (See *Presley of Southern California v. Ellen Douglas Whelan* (1983) 146 Cal.App.3d 959, 961 ["There must be a prevailing party before the fee provision applies, and no one has yet prevailed here."].) But in this case, our reversal of the orders excluding evidence of lost profits and denying leave to amend will have no adverse effect on plaintiff's judgment for breach of contract, a

final judgment from which USC did not appeal. On remand, plaintiff's judgment will remain intact even if plaintiff fails to recover additional damages for lost profits and fraud. Plaintiff may recover additional damages on remand, but in no event will plaintiff's judgment be reduced. Accordingly, because plaintiff has won a final judgment, the prevailing party issue is ripe for review despite our reversal and remand for further proceedings.

Turning to the merits of plaintiff's contention, we agree that the trial court erred as a matter of law in identifying USC as the prevailing party when it was plaintiff who had prevailed on the only contract claim in the main action, as well as on the cross-complaint. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) Plaintiff should not be penalized for having failed to recover lost profit damages, when it was the trial court's error that precluded it from presenting evidence of lost profits. "The fact that a party's recovery in an action under a contract is less than the amount he prayed for does not make his adversary the prevailing party within the meaning of Civil Code section 1717. (*Sukut-Coulson, Inc. v. Allied Canon Co*. (1978) 85 Cal.App.3d 648, 650, 656 . . . .)" (*Buck v. Barb* (1983) 147 Cal.App.3d 920, 926.) We therefore reverse the finding that USC was the prevailing party under Civil Code section 1717 and we reverse USC's attorney fee award under that section. We direct the trial court on remand to enter a new order finding plaintiff to be the prevailing party under Civil Code section 1717 and awarding plaintiff its reasonable attorney fees as the prevailing party.

As for costs, plaintiff contends the trial court erroneously awarded USC costs based on its determination that USC's $501,000 statutory settlement offer exceeded plaintiff's recovery of $433,000 plus pre-offer costs. As we stated with regard to the prevailing party issue, the costs order, which would typically be rendered moot with a reversal and remand for further proceedings (see *Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402), is not moot here because plaintiff's final judgment for breach of contract will remain intact regardless of what happens on remand. We therefore will reach the merits of plaintiff's contention.

According to plaintiff, "[t]he trial court erroneously reduced Sargon's pre-offer costs from $46,129.20 to $22,075.95 through two attacks: (1) It apportioned costs to already-dismissed individual defendants and (2) it struck certain costs as unreasonable. This improper slicing of more than $24,000 in costs is significant because . . . [it] brought Sargon's total recovery to $499,156.08, just $1,843.92 below the 998 offer USC made on July 3, 2001."

We agree with plaintiff that the trial court erred in apportioning about one-third of plaintiff's pre-offer costs to the individual defendants who were previously awarded summary judgment. There is no basis for such an apportionment, which is not allowed under Code of Civil Procedure section 1032. "In other words, even though plaintiffs had not prevailed against all the defendants, they were entitled to recover their costs against the two losing defendants. But the losing defendants were not entitled to an apportionment of the costs." (*Stiles v. Estate of Ryan* (1985) 173 Cal.App.3d 1057, 1066.) Apportionment is not available simply because plaintiff failed to prevail on all causes of action. "The successful plaintiff is entitled to recover the whole of his or her costs, despite a limited victory. The defendant is not entitled to an offset, even though the defendant prevailed to some (lesser) extent. [Citations.]" (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1200 – 1201.)

We disagree with USC's contention that the trial court properly apportioned costs under a reasonableness standard. When plaintiff's counsel correctly objected below that apportionment was not allowed, the trial court stated that it would still reduce plaintiff's costs by the same amount under a reasonableness standard: "Well, maybe we're talking about a reasonableness here, although it was not articulated that way." We are not persuaded, however, that the record supports any finding other than the reduction was based on an apportionment of costs. Accordingly, we reject the rationale that the apportionment may be affirmed under a reasonableness standard and reverse the order apportioning costs.

Given our determination that the apportionment was improper, it necessarily follows that plaintiff's net recovery will now exceed USC's $501,000 section 998 offer. Accordingly, we reverse USC's award of costs under section 998 of $50,977.72.

Plaintiff also challenges the striking of $5,400 from plaintiff's costs bill, which represents the difference between first class and coach airfare for a USC employee, Dr. Abou-Rass, to travel from Saudi Arabia to attend his deposition in Los Angeles. USC had agreed to pay at least part of Dr. Abou-Rass' airfare, but plaintiff ended up reimbursing Dr. Abou-Rass for the full cost of a first class ticket that Dr. Abou-Rass had purchased on his own initiative, insisting that he had an undisclosed medical condition. While each side has accused the other of reneging on their agreements to pay for Dr. Abou-Rass' travel expenses, and while the nature of the medical condition was never disclosed despite USC's request to Dr. Abou-Rass for information, there is no dispute that Dr. Abou-Rass bought the first class ticket on his own initiative. As plaintiff's counsel pointed out below, "this was not a disagreement between U.S.C. and Sargon. It was Dr. Abou-Rass who was making the demand" for first class airfare. The trial court made no finding with regard to the medical condition's existence, stating: "Dr. Abou-Rass does say in his letter that he has a fear of closed in spaces. I don't know how that's any better in coach or first class or business. It's still close in space. But it might be. I don't know, but there's no medical information before me at all. I see there's a request for it by U.S.C. I don't have any evidence at all that anything was supplied, or that it exists."

Given that USC was obligated to produce its employee for his deposition, and it was USC's employee, and not plaintiff, who purchased the first class ticket, we conclude it was an abuse of discretion for the trial court to force plaintiff to bear the entire $5,400 difference between first class and coach airfare. We direct the trial court on remand to apportion the difference between the parties in a reasonable manner.

Finally, we conclude plaintiff is entitled to the $5,000 cost of obtaining a videotape of the USC Monte Carlo Symposium. Plaintiff contends, and USC does not dispute, that it had to purchase the videotape from Dr. Rihan because USC refused to produce it in discovery. The videotape was important evidence in the case and should have been

allowed. (Code Civ. Proc., § 1033.5, subd. (c)(4).) The fact that the videotape was not played at trial is irrelevant.

DISPOSITION

In B167519 (consolidated with B169619): (1) the breach of contract judgment for plaintiff, from which USC does not appeal, is a final judgment; (2) we reverse the in limine ruling excluding evidence of lost profit damages and remand for a new trial on lost profit damages; (3) we reverse the order denying plaintiff leave to amend the complaint to include fraud allegations and remand for further proceedings; (4) we reverse the order awarding USC its attorney fees as the prevailing party under Civil Code section 1717; (5) we reverse the order awarding USC its costs under Code of Civil Procedure section 998; (6) we direct the trial court on remand to award plaintiff additional costs in accordance with the views stated in this opinion; and (7) we direct the trial court on remand to award plaintiff reasonable attorney fees as the prevailing party under Civil Code section 1717. Plaintiff is awarded its costs on appeal.

In B163707, we reverse the judgment of dismissal and underlying orders sustaining the demurrer and striking the complaint. Plaintiff is awarded its costs on appeal.

NOT TO BE PUBLISHED.

SUZUKAWA, J.*

We concur:

SPENCER, P. J.

MALLANO, J.

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)